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Cause No. PD-0469-19

In the Court of Criminal Appeals
for
The State of Texas

Ex parte Nathan Sanders

Arising from Cause No.07-18-00335-CR
in the Seventh Court of Appeals in
Amarillo, Texas

Petitioner's Reply Brief

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Oral Argument is Requested.

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Statement Regarding Oral Argument

While this Court has not granted oral argument, it is not too late. A chance for counsel to answer this Court's questions will benefit the development of several important and far-reaching areas of Texas law, including not only the ultimate substantive issue of the unconstitutionality of section 42.07 of the Texas Penal Code, but also intermediate questions such as:

- What exact process should be applied to as-written challenges to penal statutes?
- Which party has the burden to do what in an as-written challenge?
- When an argument that error was waived in the trial court is waived in the Court of Appeals, so that a party cannot make it here? and
- What constitutes waiver of an argument in the trial court?

Argument

The State never addresses Mr. Sanders's arguments.

Mr. Sanders says that communications intended to evoke an emotion are no less "speech" than communications intended to convey a fact.[1]

He says that section 42.07(a)(7), in restricting communications based on the emotions they are intended to evoke, is a content-based restriction.[2]

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[1] *Petitioner's Brief* at 38.

[2] *Id.* at 23.

He says that content-based restrictions are presumed to be unconstitutional.[3]

He says that speech that is not in an unprotected category is protected.[4]

He says that the state may not restrict protected speech based on its content.[5]

He says that speech that invades substantial privacy interests in an essentially intolerable manner is not, and has never been, one of the unprotected categories of speech.[6]

He says that the Supreme Court's suggestion otherwise in *Cohen* was dicta.[7]

He says that any legitimate sweep that section 42.07(a)(7) has is wholly incidental.[8]

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[3] *Id.* at 27.

[4] *Id.* at 25.

[5] *Id.*

[6] *Id.* at 29, 41.

[7] *Id.* at 21.

[8] *Id.* at 27.

He says that section 42.07(a)(7) restricts a real and substantial amount of protected speech in relation to that incidental legitimate sweep.[9]

He says that a statute that is facially overbroad fails the "narrow tailoring" prong of strict scrutiny regardless of the State's compelling interest.[10]

The State has not addressed the merits.

The real question presented is whether section 42.07(a)(7) is facially overbroad.

The State claims, "The real question presented is what *Scott* means to Texas."[11] This assertion is bizarre. *Scott* is wrongly decided; "what *Scott* means to Texas" has nothing to do with whether this Court—a court of *law*—should rectify a past error that has left Texas First Amendment law out of alignment with Supreme Court First Amendment authority.

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[9] *Id.* at 25.

[10] *Id.* at 33.

[11] *State's Brief* at 2.

The State's fanciful arguments about what Scott *"protects" have nothing to do with whether* Scott *is rightly or wrongly decided:*

Scott does not protect bad legislative enactments, nor should it.

"*Scott* protects legislative enactments (and courts) from overbreadth challenges," the State argues. We might as well add

… right or wrong!

for the State's argument has nothing to do with whether *Scott* was correctly decided. With this argument the State seems to be saying, *even if it is wrong,* Scott *is good because it protects overbroad statutes from overbreadth arguments*.

Scott does no such thing. But if its holding did protect overbroad statutes from overbreadth arguments, that would be even more of a reason for this Court to walk back *Scott*. Void legislative enactments should not be protected from overbreadth challenges, and courts don't need "protection" from overbreadth challenges, as it is a court's job to rule on such challenges.

The First Amendment is more important than legislative enactments or courts' time. Currently there is a spate of Texas statutes requiring this Court's scrutiny. Two of them are currently before this Court in at

least four different cases. One of them, section 42.07, has been held unconstitutional by an intermediate court[12] and at least two trial courts.[13] This court has been considering the constitutionality of the other, section 21.16, for more than a year.[14]

These constitutional arguments are not frivolous. They need to be made, and they need the careful attention that this Court is giving them.

Scott does not prevent overbreadth claims, nor should it.

Then the State claims, "*Scott* stops bad actors from attempting to hide behind the rights of others" (*right or wrong!*).

First, *Scott* doesn't do this either—overbreadth challenges, which protect the rights of those not before the court, are still permitted within the law. Here the State makes the contrapositive of an as-applied challenge. *Yes*, the State agrees, *this statute may sweep too broadly, but Mr. Sanders himself falls within what we perceive as the plainly legitimate sweep.*

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[12] *Ex parte Barton*, 586 S.W.3d 573 (Tex. App.—Fort Worth 2019).

[13] *State v. Jasper Chen*, No. 14-19-00373-CR, pending in the Fourteenth Court of Appeals; and *State v. William Hartley*, Nos. 01-18-01124-CR and 01-18-01125-CR, pending in the First Court of Appeals.

[14] *Ex parte Jordan Jones*, No. PD-0552-18.

This effectively concedes that the statute is overbroad, but argues that overbreadth arguments are themselves invalid because they would throw out some legitimate sweep with the bathwater of the chilling effect on protected speech. This has never been held to be the case by any court, including this one, which has struck down statutes on facial-overbreadth challenges.[15]

Second, while the speech described in the record in this case might well be frowned upon, Mr. Sanders is not such a "bad actor" that his speech falls into any category of historically unprotected speech. His speech, as described in the record, is not within the statute's plainly legitimate sweep.

Even if it were, bad actors are allowed to make overbreadth challenges under the First Amendment *to protect against the chilling of protected speech*.[16] The very existence of an overbroad statute, chilling speech, is harmful.[17]

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[15] *See, e.g.*, *Ex parte Perry*, 483 S.W.3d 884, 918 (Tex. Crim. App. 2016); *Ex parte Lo*, 424 S.W.3d 10, 19 (Tex. Crim. App. 2013).

[16] *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

[17] "[T]he Court has viewed the importation of 'chill' as *itself* a violation of the First Amendment." *Dickerson v. United States*, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting).

The social costs created by the overbreadth doctrine are why the Court has insisted that a law's application to protected speech be real and substantial in relation to the law's plainly legitimate applications.[18] That requirement that overbreadth be *substantial* is a safety against courts' carelessly invalidating statutes where the legislature has attempted to restrict unprotected speech but incidentally swept in some protected speech.

That is the opposite of the situation here, in which the legislature has, in attempting to restrict protected speech, incidentally swept in some unprotected speech.

The State even gets *Scott*'s holding wrong.

The State claims that "the core holding" of *Scott* is "that harassment covered by Texas Penal Code 42.07 is non-communicative conduct…."[19]

What *Scott* held, however, was:

> To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected

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[18] *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

[19] *State's Brief* 1.

> by the First Amendment because, under the circumstances presented, **that communicative conduct** invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.[20]

Thus the holding of *Scott v. State* is not that the "communications" described by section 42.07 are "not 'speech' as contemplated by the First Amendment,"[21] but rather that *even* speech ("communicative conduct"), if it invades substantial privacy interests (whatever those are) of another in essentially intolerable (whatever that means) manner, is not protected by the First Amendment.

This *speech, but unprotected* holding was the creation of a new category of unprotected speech. The dicta from *Cohen* were mere dicta. The Supreme Court has never held that communicative conduct (speech) falls outside the protection of the First Amendment because it violates privacy. This Court in *Scott* put those dicta from *Cohen* to work doing something they never were meant to do, and that has caused no end of mischief in Texas free-speech law.[22]

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[20] *Scott v. State*, 322 S.W.3d 662, 670 (Tex. Crim. App. 2010) (emphasis added).

[21] *State's Brief* 12. *See also id.* fn.34 (claiming, "the distinction drawn in *Scott* was between communicative and non-communicative conduct").

[22] Please see *Petitioner's Brief* at 32 fn.52.

THE STATE BEARS AND HAS FAILED TO PICK UP—MUCH LESS CARRY—THE BURDEN.

The State claims, "the defendant, as movant, bears the burden to prove the statute's overbreadth." That is false.

The very phrase "strict scrutiny" suggests the government's burden: does the government's justification for the statute stand up under strict scrutiny? And indeed it is the government's burden in every strict-scrutiny case to justify its regulation.[23] It is "a core premise of strict scrutiny … that the heavy burden of justification is *on the State*."[24]

The rules of strict scrutiny itself put the burden on the government: a statute "is *invalid* … *unless* it is justified by a compelling government interest and is narrowly drawn to serve that interest."[25] (*Invalid unless*

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[23] *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002). From the earliest cases describing what we know as strict scrutiny (then known as the "compelling government interest test") the burden has clearly been on the government. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (classification is unconstitutional "unless shown to be necessary to promote a compelling governmental interest"), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

[24] *Burson v. Freeman*, 504 U.S. 191, 226 (1992) (Stevens, J., dissenting).

[25] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (emphasis added).

as opposed to rational-basis review's *upheld unless.*[26]) Strict scrutiny "requires *the Government to prove* that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[27]

More specifically, when a statute is a *content-based restriction*, it is presumed to be unconstitutional.[28] Mr. Sanders has, by showing that the statute is content based (either on its face, as here, or through extrinsic facts if the statute is content neutral on its face), satisfied his burden. The government then bears the burden to rebut that presumption.[29] "Content-based laws … may be justified only if *the government proves* that they are narrowly tailored to serve compelling state interests."[30]

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[26] *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (when applying rational basis review, court "will not overturn such [government action] unless …").

[27] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (emphasis added).

[28] It would make no sense that to say that the defendant bears some burden when the statute is presumed to be unconstitutional.

[29] See *State v. Doyal*, _ S.W.3d _, 2019 WL 944022, No. PD-0254-18 at *17 (Tex. Crim. App. Feb. 27, 2019) (Slaughter, J., concurring) (describing rules for content-based regulations).

[30] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2226.

Illustrative of the specific principle is *United States v. Stevens*, in which the burden of rebutting the content-based statute's presumptive invalidity by providing "evidence" that *depictions of animal cruelty* was among "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law"—in short, the burden of disproving overbreadth—fell on the government.[31] In *Stevens*, as here, the government failed its burden, so the Supreme Court's judgment was simple: "substantially overbroad, and therefore invalid."[32]

United States v. Alvarez also demonstrates how the government may disprove the overbreadth of a content-based restriction: "Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with

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[31] *United States v. Stevens*, 559 U.S. 460, 472 (2010). *See also Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'"); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 463 (2015) (Scalia, J., dissenting) ("Because Canon 7C(1) restricts fully protected speech on the basis of content, it presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny.").

[32] *United States v. Stevens*, 559 U.S. at 482.

'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription[.]'"[33]

Because content-based restrictions are normally prohibited, the burden falls on the government to disprove overbreadth.

The State's authority agrees with *Reed* and *Stevens* and *Alvarez*.

The State's contrary argument is based on *Virginia v. Hicks* and this Court's *Ex parte Perry*[34] and *State v. Johnson*.[35] How can these cases be rectified with the many cases that put the burden of satisfying strict scrutiny squarely on the government?

Reed v. Town of Gilbert, Ariz. teaches that there are two sorts of content-based restrictions: those that are content based *on their face*; and those that are facially content neutral, but "cannot be justified without reference to the content of the regulated speech, or that were adopted

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[33] *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

[34] *Ex parte Perry*, 483 S.W.3d at 902.

[35] *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2016).

by the government because of disagreement with the message the speech conveys."[36]

Ex parte Perry and *State v. Johnson* both cite *New York State Club Ass'n, Inc. v. City of New York*[37] for the proposition that "[t]he person challenging the statute must demonstrate from its text and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally."[38] Whether the defendant had made the required demonstration was not discussed in either *Perry* or *Johnson*.

In *Virginia v. Hicks* the statute was not on its face a content-based restriction, so the defendant had the initial burden of showing that the regulation restricted "*any* First Amendment activity."[39] In *New York State Club Ass'n, Inc. v. City of New York*, similarly, the Court was referring to a demonstration *that the restriction would impair speech or association*.[40] Neither of those Supreme Court cases contradicts the

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[36] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227 (cleaned up).

[37] *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 14 (1988).

[38] *Ex parte Perry*, 483 S.W.3d at 902; *State v. Johnson*, 475 S.W.3d at 865.

[39] *Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

[40] *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. at 14.

proposition, explicit in *Reed*,[41] *Alvarez*,[42] *Stevens*,[43] and *Brown*,[44] that if a regulation is a content-based restriction on speech, the burden is on the state to satisfy strict scrutiny.

This, then, is the only burden on a defendant: to show that a restriction is content based on its face, or if content neutral on its face, "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message the speech conveys."[45]

In other words, the defendant's burden is to show that strict scrutiny applies; beyond that the burden is on the government.

Section 42.07 is a content-based restriction on speech because it defines the regulated speech by its purpose.[46] Because it is a content-based restriction on speech, the State has the burden of

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[41] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015).

[42] *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

[43] *United States v. Stevens*, 559 U.S. 460, 468 (2010).

[44] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011).

[45] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

[46] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

showing that the statute meets strict scrutiny—that there is a compelling state interest, and that the statute is narrowly drawn (that is, not *overbroad*) to satisfy this interest.

THE STATE HAS NOT TRIED TO SATISFY STRICT SCRUTINY.

Here the State has made no attempt to rebut the presumption that this content-based restriction is invalid: it has made no effort to show that the statute is narrowly tailored, no effort to demonstrate a compelling state interest in preventing embarrassment and annoyance, nor any effort to provide the evidence required by *Stevens* and *Alvarez*.

The overbreadth of section 42.07(a)(7) is real and substantial: The speech criminalized by the statute falls by definition into no recognized category of historically unprotected speech. And while the statute may have some legitimate sweep—true threats, for example—that legitimate sweep is purely incidental. Any example of speech that the statute restricts (including Mr. Sanders's speech here, as described in the record), outside of those incidental cases of unprotected speech, is protected speech.

THIS OVERBREADTH ANALYSIS IS STRICT-SCRUTINY ANALYSIS.

The recognized categories of historically unprotected speech are the sum total of all categories of speech that the government has a

compelling interest in restricting, and if a statute is *substantially overbroad*—restricting a real and substantial amount of speech outside of those categories—it cannot also be *narrowly tailored* to a compelling state interest.

"Substantially overbroad but narrowly tailored" is a logical impossibility.

The State asks, "How can one know the size of either sweep (and hence their relationship to each other) without determining if the protected speech restricted by the statute satisfies the appropriate level of scrutiny?"[47] The answer is, "that question is nonsensical."

> According to the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep."[48]

The same principle, phrased differently by the Supreme Court:

> The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[49]

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[47] *State's Brief* 8 fn.25.

[48] *Ex parte Lo*, 424 S.W.3d at 18 (quoting Virginia v. Hicks, 539 U.S. at 118–19).

[49] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

The *legitimate sweep* of the statute, in other words, comprises only the *unprotected speech* it restricts.[50]

The restriction of protected speech based on its content is never legitimate. Protected speech can *never* be included in the legitimate sweep of the statute. The State's question is nonsensical because "protected speech restricted by the statute" cannot satisfy any level of scrutiny.

Stevens IS VERY CLEAR THAT PROTECTED SPEECH CANNOT BE LEGITIMATELY REGULATED.

The State calls the idea that protected speech cannot be legitimately regulated a "misperception." The State should be given an opportunity to ask the Supreme Court to hear that argument, as the Supreme Court has already, in *Stevens*, addressed it quite clearly: the First Amendment permits restrictions upon the content of speech only in a few "historic and traditional categories long familiar to the bar."[51] The First Amendment does not permit restrictions upon the content of speech

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[50] "The Court has made clear that facial challenges of this sort can succeed only if there is a significant imbalance between the *protected speech* the statute should not punish and the *unprotected speech* it legitimately reaches." *Shackelford v. Shirley*, 948 F.2d 935, 940 (5th Cir. 1991) (emphasis added).

[51] *United States v. Stevens*, 559 U.S. 460, 468 (2010).

outside of those categories. That is, *protected speech cannot be legitimately regulated*.[52]

FEELINGS ARE NOT WALLS, AND EMAILS ARE NOT GRAFFITI.

The State tries to analogize to the offense of *graffiti*, which is "without the effective consent of the owner … intentionally or knowingly mak[ing] markings … on the tangible property of the owner ...."[53]

Aside from the difference between coloring on other people's things and hurting transient feelings, the State misses the crucial distinction:[54] section 28.08 is not a content-based restriction. Painting "BE KIND" on others' stuff is as much a crime as painting "FUCK THE DRAFT" or "FUCK YOU" on it.[55] If, like section 42.07, section 28.08 treated

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[52] Based, that is, on its content. A content-neutral restriction—"don't make loud noise in the park at night"—reaches all protected speech and all unprotected speech equally. Overbreadth analysis of the sort that applies to content-based restrictions makes no sense in that context, as the legitimate sweep of a content-neutral statute is "all content."

[53] Tex. Penal Code § 28.08(a).

[54] Aside from the fact that one's feelings cannot be defaced like a wall.

[55] This is a good example of a content-neutral restriction, and a demonstration of how overbreadth does not invalidate a content-neutral restriction: almost anything you could paint on a fence is protected speech, but as long as the restriction does not discriminate between one content and another no amount of overreach renders it overbroad.

communications with the intent to evoke one emotion differently than communications with the intent to evoke another, it too would be a content-based restriction.

The State's "swastika" example accidentally makes a terrific point.

The State uses the specific example of "spray-paint[ing] a swastika just for shock value."[56] Spray-painting a swastika is speech.

If someone spray-paints a swastika to convey the *idea* that national socialism is a valid ethos, that is protected speech. But, suggests the State, if someone spray-paints a swastika "just for shock value," without "car[ing] about" the "message[]," *that* is unprotected speech.[57]

To the contrary, a restriction aimed at swastikas would be a content-based restriction on speech, regardless of whether the person doing the spray-painting intended sincerely to show support for national socialism, or only to annoy. Speech is no less protected because it is intended only to cause an emotional effect.

The power to decide whether a speaker intends to convey an idea with his speech would, like the power to decide whether communication

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[56] *State's Brief* at 13.

[57] *Id*.

is "legitimate,"[58] be the power to censor. The body that can proclaim some ends of speech illegitimate and others legitimate possesses the power the State covets: to restrict speech.

The distinction that *United States v. Stevens* and its progeny draw is not between *legitimate* and *illegitimate* communication, but between *protected* and *unprotected* communication. If any statement about "legitimate communication"[59] can be made post *United States v. Stevens*, it is this: only unprotected speech—that is, speech in *Stevens*'s list of categories of historically unprotected speech—is illegitimate or unprotected communication. Communications outside those categories are legitimate and protected, and cannot be restricted based on their content.

Failing to accept its burden or engage on the merits, the State engages in false innuendo.

A facial challenge, writes the State, is "what a defendant raises when he cannot claim [that] a statute is unconstitutional as applied to him."[60]

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[58] *Cf.* Scott v. State, 322 S.W.3d at 670.

[59] *Scott v. State*, 322 S.W.3d at 670.

[60] *State's Brief* at 3.

To the contrary, the problem for Mr. Sanders is not that he "cannot claim" that section 42.07(a)(7) is unconstitutional as applied to him. He can; it is: his speech was not *obscenity*, not *defamation*, not *fraud*, not *incitement*, not *integral to any non-speech criminal conduct*, not *fighting words*, not *child pornography*, not *true threats*, and not *speech presenting some grave and imminent threat the government has the power to prevent*.[61] Because his speech fell into no category of unprotected speech, it was protected. The application of a statute to punish protected speech based on its content is an unconstitutional application of the statute.

The problem, though, is that Mr. Sanders cannot *at this moment* fight about the statute's as-applied unconstitutionality. The record does not show that the police report[62] is an exhaustive description of his communications to the complainant, so the door is not closed on the possibility that his speech fell in some unprotected category. It will take a trial, with evidence and cross-examination, to close that door. At trial, Mr. Sanders could make an as-applied challenge, and if the record in

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[61] Please see *Petitioner's Brief* at 26–27.

[62] Clerk's Record ("CR") 5–11.

this case is an exhaustive description of his communications, he will win.

But trials are costly (in time and money), and even a defendant who expects to be vindicated at trial, either on the elements of the offense or on a challenge to the statute's application to him, is well advised to litigate the facial unconstitutionality of the statute before trial if that unconstitutionality is in question.

THE STATE'S BRIEF IS FULL OF UNSUPPORTED ALLEGATIONS.

For example, "The rules designed to prevent review of matters not properly presented to the trial court are often ignored in First Amendment cases."[63] If this were true, the State would provide examples of cases in which intermediate courts considered First Amendment issues over the State's procedural-default objections.[64]

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[63] *State's Brief* at 9.

[64] The State has claimed procedural default in *State v. Barton*, No. PD-1123-19. In that case the State represented to the intermediate court that in the trial court Mr. Barton had argued that section 42.07(a)(7) is unconstitutionally overbroad and vague. *State's Brief* in *Ex parte Barton*, No. 02-17-00188-CR, *passim*. If Mr. Barton had not in fact argued overbreadth and vagueness in the trial court, the State invited error.

The State claims, "even content-based restrictions on protected speech can be valid if they satisfy strict scrutiny."[65] The State provides no example of the post-*Stevens* Supreme Court upholding a content-based restriction on protected speech. There *is* one such example, and it is sui generis: *Williams-Yulee v. Florida Bar*. Mr. Sanders discussed it in his brief.[66] At most four justices joined the portion of the opinion applying strict scrutiny; Justice Ginsburg (and possibly Justice Breyer) would have applied intermediate scrutiny.[67] And as Justice Scalia noted in dissent, the Court in that case applied not strict scrutiny but "the appearance of strict scrutiny."[68]

In any case, the State has not *in this case* made any effort at showing that the statute satisfies strict scrutiny. There is no compelling state interest in preventing the low-level emotional harm of harassment, and even if there were, the statute, which forbids speech as described in

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[65] *State's Brief* at 8.

[66] Please see *Petitioner's Brief* at 22 fn.24.

[67] *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 457–58 (2015).

[68] *Id.* at 464 (Scalia, J., dissenting).

the first section of Mr. Sanders's opening brief, would not be narrowly tailored to satisfy it.

COMMUNICATIONS ARE COMMUNICATIVE.

The State repeatedly describes the reach of the statute as "harassment," but the statute forbids *embarrassing* and *annoying* and *alarming* communications as well as *harassing* ones.

The State's substantive argument boils down to this claim: "words that are not intended to communicate an idea are not 'speech' as contemplated by the First Amendment."[69] It is simply untrue. Aside from the examples in Mr. Sanders's opening brief[70]—horror movies and erotica and music and dance and abstract art, none of which necessarily communicates an idea but all of which are protected because they generate thoughts and emotions—the wrongness of the State's (and the *Scott* court's) position that only idea-communicating words are protected can be illustrated as follows:

What is the government doing?

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[69] *State's Brief* at 12.

[70] *Petitioner's Brief* at 38–40.

That question communicates no ideas. And yet it would be exceedingly foolish to say that it is not speech, such that the government could forbid its utterance and face only intermediate scrutiny.

The State claims that *Reed* has no application to speech not intended to communicate ideas or thoughts. Not so. *Reed* talks of "communicative content" and "message," it is true, but a *message* or *communicative content* is not necessarily an "idea." It may instead be the asking of a question, an attempt at persuasion or, as in the case of section 42.07, the evocation of an emotion.

No authority supports the State's proposition that this was insufficient preservation of error in the trial court.

The State argues that Mr. Sanders has waived an overbreadth challenge to Sec. 42.07(a)(7).[71]

In support of this argument, the State cites *Lankston v. State*[72] for the proposition that an objection must be sufficiently specific in order to preserve error for an appeal. While this rule is long standing and very familiar to all frequent practitioners before this Court, it does not mean what the State claims it means.

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[71] *State's Brief* 6–8.

[72] *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

The *issues*—whether the statute is overbroad under the First Amendment and whether the statute satisfies strict scrutiny—were raised in the trial court. The State recognized and briefed the issues in the trial court.[73] The trial court ruled on those issues.[74] The parties briefed those issues in the court of appeals, and the court of appeals ruled on them.

Mr. Sanders preserved the overbreadth argument.

The State argues that despite the State *responding* in the trial court to Mr. Sanders's overbreadth argument and despite the trial court's *ruling* on that argument, Mr. Sanders "presented no actual overbreadth argument."[75] That argument is frivolous.

In the trial court Mr. Sanders wrote:

> Because section 42.07(a) of the Texas Penal Code is overbroad under the First Amendment, please set aside the *Information*, grant habeas corpus relief under Chapter 11 of the Texas Code of Criminal Procedure, dismiss the *Information*, and discharge the accused.[76]

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[73] CR 82–91.

[74] CR 94–95.

[75] *State's Brief* at 7. The State appears to be trying to convert its misunderstanding of its own burden (please see above at 13) to a waiver argument. *Id.*

[76] CR 39.

He wrote more as well, but this prayer alone "stated the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint[.]"[77] The State cannot argue that Mr. Sanders's statement of the grounds for the ruling he sought did not make the trial court aware of the complaint, because the trial court expressly ruled on overbreadth.

Texas Rule of Appellate Procedure 33.1(a)(1)'s second requirement for a party to preserve error is that the record show that the request, objection, or motion complied with the requirements of the rules.[78] Here the request was in an application for writ of habeas corpus. The rules for applications for writs of habeas corpus provide:

> Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it.[79]

Even if Mr. Sanders had not stated explicitly that he was challenging the statute as overbroad under the First Amendment, article 11.04 would

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[77] Tex. R. App. Proc. 33.1(a)(1)(A).

[78] Tex. R. App. Proc. 33.1(a)(1)(B).

[79] Tex. Code Crim. Proc. art. 11.04.

dictate that this Court should read the record to find preserved error, as it did in *Gillenwaters v. State*,[80] another case dealing with a similar issue.

In *Gillenwaters v. State* this Court considered whether a motion for new trial sufficiently stated a vagueness and overbreadth challenge to section 42.07(a)(4), the telephonic harassment statute. Following conviction for telephonic harassment, the defendant had filed a motion for new trial which argued that the statute was unconstitutional as applied to his case.[81]

The procedural posture of *Gillenwaters* is different from the posture of this case. In *Gillenwaters*, the Austin Court of Appeals had held that it need not consider the as-applied challenge because of a failure to preserve error.[82] The ultimate resolution of that case by this Court was to remand to the lower court for consideration of the as-applied challenge.[83]

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[80] *Gillenwaters v. State*, 205 S.W.3d 534, 537-38 (Tex. Crim. App. 2006). In Gillenwaters the question of whether the issue was waived was raised in the petition for discretionary review. *Id.* at 537.

[81] *Id.* at 537.

[82] *Id.* at 537.

[83] *Id.* at 538.

This Court ruled:

> Although the word 'vague' or 'vagueness' appeared nowhere in appellant's motion, any reasonable trial judge probably would have understood the motion, in context, to be asserting an 'unconstitutionally vague as applied' challenge to the statute, since appellant's consistent complaint throughout the trial had been that the statute was too vague to be enforceable.[84]

On the other hand, this Court reasoned, the trial judge could not have inferred an *overbreadth* challenge to the statute because nothing in Gillenwater's arguments put the trial court on notice.[85]

Here, Mr. Sanders put the trial court on notice of the overbreadth challenge.

Mr. Sanders was not required to make every subargument to preserve error.

The State writes:

> Appellant is in no position to complain about *Scott*, having failed to raise his argument about then-existing, allegedly controlling case law in his pretrial writ.[86]

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[84] *Id.*

[85] *Id.* at 538.

[86] *State's Brief* at 2.

What the State seeks to do is foreclose the argument **that the holding of *Scott v. State*, precedent that bound the court below, should be overruled**.

The State would have this Court believe that Texas Rule of Appellate Procedure 33.1(a) requires that the "complaint" made include all possible arguments that could be made in support of that complaint, a proposition which finds support neither in the authority cited by the State nor this Court's precedent in *Gillenwaters*.

So long as Mr. Sanders's pre-trial application for a writ of habeas corpus was sufficient to preserve an overbreadth challenge, the application of Tex. R. App. Proc. 33.1(a) as set forth in *Gillenwaters* is determinative; what must be preserved is the "complaint" (that the statute is unconstitutionally overbroad), not every single subargument that may be made on appeal.

This Court always retains the right to review its own precedent; the trial court in this case could no more overrule this Court's precedent than a moth fly against a hurricane. To require the level of specificity that every argument raised on appeal must also have been raised in the trial court ignores the longstanding construction of Rule 33.1(a) and "complaint" as used therein.

De novo review is de novo.

The State's waiver arguments also ignore the de novo nature of review of legal questions like the one here. De novo review means that the reviewing court "do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below."[87]

When conducting a de novo review, the reviewing tribunal exercises its own judgment and redetermines each issue of fact and law.[88] "By definition, *de novo* review entails consideration of an issue as if it had not been decided previously."[89]

Does this "consideration of an issue as if it had not been decided previously" mean "reconsideration on the first briefs the parties filed"? Or does it mean "reconsideration of the issue, based on the most current briefing the defendant can provide"?

The State's waiver complaint is not that Mr. Sanders did not give the trial court notice of what he wanted and why, but that Mr. Sanders's

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[87] *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009).

[88] *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

[89] *United States v. George,* 971 F.2d 1113, 1118 (4th Cir. 1992).

brief in the trial court was not as thorough as its brief before this court. Clarity of objection never has required a thorough brief on the merits. Mr. Sanders suspects that it is rare that a brief in the trial court is up to Court of Criminal Appeals litigation standards.

The trial court and the State both knew that overbreadth and strict scrutiny were at issue. By any existing standard the issues were preserved. De novo review is review of these preserved issues, with the best arguments in support (and against) that the parties can now marshal.

If this was error, the State invited it.

The State's waiver argument is not an argument that the Court of Appeals' opinion was correct. It is an argument, instead, that the Court of Appeals erred by even addressing the issue.[90]

If the State had thought the Court of Appeals should not decide the substantive issue, it could have argued that in the Court of Appeals. It did not do so.

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[90] *Cf. State v. Heath*, No. PD-0012-19, 2019 WL 6909439 (Tex. Crim. App. Dec. 18, 2019) (court of appeals erred when it addressed an issue not presented to the trial court or raised by the parties on appeal).

If the State had thought the Court of Appeals had erred in deciding the substantive issue, it could have filed a petition for discretionary review; it did not do that either.

The State astoundingly claims that it "sometimes prefers vindication to victory on technical grounds."[91] In other words, the State is willing to invite error on technical grounds when it thinks it will be vindicated on the merits.

The problem with this approach is that that sometimes the State will miscalculate, waiving technical grounds when it is wrong on the merits.

In that situation, the State, which waived the procedural-default argument as long as it thought it would win, cannot, once it begins to realize that it will not be "vindicated," retreat to the error that it invited in the lower courts. If the State forgoes technical grounds, it has forgone technical grounds, and must accept the consequences even if those consequences are not vindication.

If Mr. Sanders had not preserved error, then at best the State here would have waived any procedural-default argument. At worst, the

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[91] *State's Brief* at 9.

State invited error in the Court of Appeals. The only issue before this Court is the substance of the Court of Appeals' opinion.

Policy supports preservation.

This Court in *Gillenwaters* stated that the policy underlying the preservation requirement is to ensure that the trial court has an opportunity to prevent or correct errors, thereby eliminating the need for a costly and time-consuming appeal; guarantees that opposing counsel will have a fair opportunity to respond to complaints, and promotes the orderly and effective presentation of the case to the trier of fact.[92] Here the trial court could not have "prevented or corrected" the overruling of *Scott* because only this Court has the power to overrule *Scott*.

If the trial court had been given a precognitive peek at Mr. Sanders's PDR brief and done what Mr. Sanders argued, holding the statute unconstitutional, the State would have appealed. The Court of Appeals would have reversed. Mr. Sanders would have filed a petition for discretionary review. And everyone would be in the exact same position they are today.

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[92] *Gillenwaters v. State*, 205 S.W.3d at 537, *citing Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002).

The State has not shown that there is any unfair surprise that Mr. Sanders has, in this Court, argued for the overruling of a case on which the State would obviously rely to justify its position. The State had relied on that case in the trial court[93] and in the Seventh Court of Appeals;[94] the Seventh Court had expressly relied on that case to affirm;[95] and the concurrence in the Seventh Court had expressly invited this Court to reconsider that case.[96]

There is no authority for the proposition that an appellant cannot request overruling of binding precedent simply because *he* did not cite that precedent in the motion in the trial court. The policy underlying the preservation requirement does not require such extraordinary measures, and it is specious for the State to argue that the State suffers from some form of undue surprise, given the centrality of *Scott* to questions of overbreadth. Contrary to the State's assertion, as this Court has already taken up Chief Justice Quinn's request to review *Scott*

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[93] CR 90.

[94] *State's Brief* in court below at 11–15, 19–22.

[95] *Ex Parte Sanders*, No. 07–18–00335-CR, 2019 WL 1576076 at *2–*4 (Tex. App.—Amarillo, April 8, 2019).

[96] *Id.* at *5 fn.6.

by granting discretionary review in this case, Mr. Sanders is not "benefit[ting] from an argument he failed to make."[97] Rather, the State is being required to justify the constitutionality of a penal statute which infringes upon the First Amendment rights of all persons.

Conclusion

Because the State now sees the infirmity of its position and cannot satisfy its strict-scrutiny burden, it is attempting to sidestep that argument altogether by resting on preservation, an argument the State actually *did* fail to make in the court below (where it argued extensively that *Scott* controls). The State should not be permitted to sustain an unconstitutional statute that infringes on essential liberties based on the minutiae of procedural wrangling.

As the respondent in *Ex parte Barton*[98] noted, decisions such as the unconstitutionality of a statute should not be made without each party's best arguments.

Even where the statute is clearly unconstitutional, the State should not merely make specious and frivolous waiver arguments, but instead

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[97] *State's Brief* at 6.

[98] *Ex parte Barton*, No. PD-1123-19.

should muster the best substantive arguments it can—even if to do so is to confess error.

This policy is reflected in section 402.010(a) of the Texas Government Code, requiring that the court notify the Attorney General of a challenge to the constitutionality of a Texas statute; and in article 5, section 32 of the Texas Constitution.

Accordingly, rather than rest on this brief, the State Prosecuting Attorney should have an opportunity to rebrief this case, or the Attorney General should be invited to do so on the State Prosecuting Attorney's behalf.

Respectfully submitted,

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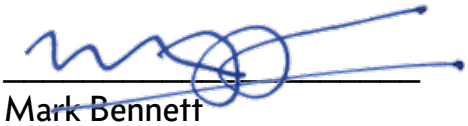

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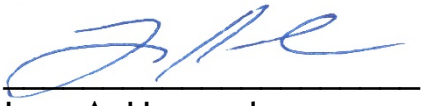

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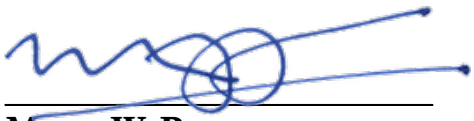

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